January 2, 2015

Dan Jiron
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USDA Forest Service Region 2
740 Simms Street
Golden, CO 80401-4720

Dear Mr. Jiron:

I am writing to file an administrative objection to the proposed Record of Decision for the Village at Wolf Creek Access Project. I filed timely comments on the Draft Environmental Impact Statement for the project on October 1, 2012, and supplemented those on October 8, 2012.

The Forest Service's proposed decision to authorize the proponent's preferred alternative for a land exchange to facilitate increased access for their desired commercial resort development at the Village at Wolf Creek is not in the public interest, and the exchange should be rejected for that reason so as to comply with the agency's guidance and policy on evaluating proposed land exchanges.

LMJV willingly and voluntarily took ownership with conveyed access in the 1987 exchange. It is beyond disingenuous now to attempt to redefine that exchange. The Forest Service and LMJV are asking the public for a land exchange "mulligan" because as the Forest Service argues in its Draft Record of Decision, the parties bungled the terms of the original exchange. The Forest Service cannot arbitrarily provide a "do over" to that exchange because the purchasers have changed their minds about access. The simple facts of the situation are the purchasers willingly took title to the property fully aware of the rights and interests conveyed at the time, and now desire different access. The Forest Service cannot selectively reopen the terms and conditions of 1987 exchange only to suit the wishes of their land exchange partner.

The Forest Service's rationale for approving the exchange relies almost entirely on alleged environmental gains that correct egregiously bad agency decisions from the 1987 land exchange. The Forest Service is insisting that moving development farther away from the ski area is an environmental and public benefit, when the Forest Service entirely created this presumed conflict with the creation of the original inholding in 1987 at the ski area base. The Forest Service also asserts great environmental benefit from regaining title to allegedly precious fens and wetlands that it traded out of public ownership willy-nilly in 1987. Those types of "oops" arguments are a tough sell to the public and don't lend a lot of credibility to the intentions behind the current proposed decision.

According to agency policy, land exchanges should be approved only when the resource values and value of the public objectives served by acquisition of the non-Federal land exceed those of the Federal lands that are to be conveyed per the requirements of 36 CFR 254.3(b)(2)(i). That is clearly not the case with this proposed land exchange. If the Forest Service proceeds as proposed with this exchange, the scenic resources of the Rio Grande National Forest will be severely degraded in violation of forest plan standards, and perhaps most importantly there will be a significant increase in habitat fragmentation and decreased connectivity and loss of habitat resilience, all in direct conflict with the Chief's explicit policy direction outlined in the Forest Service's National Roadmap for Climate Change Adaptation.

I will elaborate on these and other concerns below, but to briefly summarize here, the proposed decision strips the scenic easement requirement from basically two-thirds of the

proposed Village at Wolf Creek. The Forest Service should recall that the imposition of this scenic easement was a precondition of the 1987 land exchange and formed the complete and entire reason the agency reversed course and authorized the original exchange that created this inholding. Abandoning that pre-condition now is duplicitous at best, and an obvious violation of the very plan standards the Forest Service previously relied upon for its prior decision.

Similarly, the degradation of the Wolf Creek Pass Lynx Linkage Corridor by the approval of this project significantly degrades the physical resources of the forest. As the document acknowledges repeatedly, a set of speculative lynx conservation measures are incorporated into the decision in order to hopefully prevent a jeopardy opinion for lynx, but according to the FEIS these measures in no way are intended to even maintain the status quo for the condition of lynx habitat in the project area. Reducing the value of the linkage corridor and its value for future connectivity shrinks resilience of the corridor, and is a serious loss of existing natural resource values whose abandonment plainly cannot be comported with agency land exchange policy or its climate change resilience policy.

I appreciate your consideration of my comments and hope that you will direct the Rio Grande NF to reconsider its decision in the best interests of the American public. I've spent more than a decade of involvement closely following this project and it's time for the Forest Service to finally put down its foot and make the obvious decision that the top of Wolf Creek Pass is no place for a commercial resort development on the scale contemplated by the developer applicants.

1) The Decision Violates Forest Plan Standards for Scenic Management

The decision to proceed with the land exchange violates Forest Plan standards for scenic management, and thus does not conform to the requirement that land exchanges adhere to plan standards. "Actions carried out on NFS lands must comply with Forest Service policy as well as specific management direction contained in the Rio Grande NF's 1996 Revised Land and Resource Management Plan (1996 Forest Plan)." (FEIS at 1-15) Compliance with these standards is mandatory: "Standards are mandatory; deviation from Standards is not permissible without an amendment to the Forest Plan." (VWC Access Project Forest Plan Consistency Analysis at 1).

The specific management direction for scenic management in the 1996 Rio Grande Forest Plan includes several specific forest-wide standards, including Scenic Resource Standard 2: "Management activities which are inconsistent with the Scenic Integrity Objective **will be avoided** unless a decision is made to change the Scenic Integrity Level." (emphasis added) (1996 Forest Plan at III-36).

The FEIS documents in detail the extensive deterioration in Scenic Integrity Objective from implementing the proposed action after the national forest lands are conveyed into private ownership. Alternative 2's Moderate Density and Maximum Density scenarios in all cases result in the conversion of national forest lands that are presently rated as "high" or "moderate" Scenic Integrity Objective to non-federal lands that will be "very low" or "unacceptably low." (FEIS, Section 4.10) The Forest Plan standard plainly prohibits management activities, such as land exchanges, which are not consistent with the Scenic Integrity Objective. The Forest Service cannot proceed with the proposed exchange and adhere to the Forest Plan standards.

The FEIS fails to acknowledge this conflict with plan standards. In fact, the Draft ROD readily acknowledges that "If any component of an alternative is not consistent with Forest-wide Standards and Guidelines, it requires either the alternative be dropped/amended or a Forest Plan amendment be completed." (Draft ROD at 6). Since the Moderate Density and Maximum

Density scenarios each violate the plan standard for scenic resources, they must be dropped from consideration.

There is no analysis, evaluation, consideration, or explanation of how the Forest Service's decision complies with this forest plan standard, other than a stand alone referenced document of alleged Forest Plan Consistency Analysis that consists of nothing more than a green check mark in a box in a table. A green check mark on a table doesn't meet NEPA requirements for a "hard look" analysis of environmental impacts.

The FEIS does repeatedly state that Scenic Integrity Objectives obviously do not apply to private lands. However, the Forest Service is authorizing a management activity that will result in the conversion of existing national forest lands with high or moderate Scenic Integrity Objectives into private lands with very low or unacceptably low Scenic Integrity Objectives. The Forest Service cannot avoid consideration of the consequences to current national forest system lands of its management activity by deferring evaluation of those impacts until after the exchange is implemented, and then claiming its forest plan standards are no longer relevant because the lands have now been conveyed out of federal ownership. This is a very simple analysis – if the Forest Service management activity is implemented, national forest lands currently in compliance with forest plan standards will be unavoidably converted into lands in conflict with those plan standards. That management activity is not permitted by Forest Service regulation.

2) The Decision Strips the Scenic Easement in Contradiction to Conditions Deemed Critical to Authorization of the Original 1987 Land Exchange.

The Scenic Easement deed was a fig leaf the Forest Service applied as rationale for its about-face in authorizing the original 1987 Land Exchange. That decision initially rejected the exchange for violating visual management standards in the then applicable Rio Grande Forest Plan. The Forest Service reversed course on the premise that applying the Scenic Easement solved the conflict with forest plan standards. The Forest Service's March 6, 1986 Decision Notice stated that the exchange alternatives violated Forest Plan visual management objectives, but with the addition of the new mitigation requirement in the form of the Scenic Easement deed the exchange could proceed in compliance with Forest Plan objectives. (Decision Notice, March 6, 1986 and Wingle Memo, March 6, 1986).

Now, the Forest Service is proposing to eliminate the Scenic Easement deed from two-thirds of the development parcel, removing the easement from 205 acres and leaving it in place on 120 acres. The FEIS fails to include an analysis of how stripping the Scenic Easement from two-thirds of the development parcel complies with the original pre-condition on which the entire 1987 exchange was premised, i.e., the application of a scenic easement deed to protect Rio Grande National Forest scenic integrity and adhere to then-Forest Plan standards. If anything, the Forest Plan standards for visual management and maintenance of scenic integrity were strengthened by the 1996 Forest Plan Revision. Where is the analysis that evaluates and explains how revoking the Scenic Easement across the large majority of the development parcel now magically complies with Forest Plan standards, when 30 years ago it was crucial to changing the agency's mind and approving the creation of the development inholding?

At face value, this looks like a backdoor approach of reneging on promises to the public to protect visual resources in 1987. Does the Forest Service have any obligation to abide by the conditions it established in the 1986 Decision Notice?

3) The FEIS's Analysis of Visual Simulation Does Not Accurately Evaluate the Scenic Easement Restrictions

The FEIS analysis of visual impacts is inaccurate because the visual simulations used for the analysis presumed the application of the Scenic Easement to the entire development parcel, when in fact the proposed decision would eliminate the easement from two-thirds of the new development parcel: "Therefore, in preparing the visual simulations, some basic assumptions were made. In compliance with the Scenic Easement (discussed below) as well as Mineral County requirements, all simulated buildings are 48 feet in height or less." (FEIS at 4-152)

Because no project has been applied for before Mineral County, or approved, and because the county can grant a variance to height requirements in any case, the only factual predictable information relevant to the analysis is the Scenic Easement. The visual simulations should be run with the actual Scenic Easement restrictions proposed for each alternative, i.e., for Alternative 2 those should include a 48-foot height restriction on the 120 acres of the original development and none on the 205-acre newly acquired parcel since the Forest Service would eliminate the visual protection requirements on this new parcel. The FEIS is not analyzing an accurate portrayal of future potential development by using assumptions that are contrary to parameters of the preferred alternative. The federal decision-maker cannot base his/her decision on a visual simulation that is not grounded in reality.

4) The Decision Fails to Meet the Stated Purpose and Need of Minimizing Environmental Impacts to Natural Resources

The project's stated purpose and need is provide enhanced access to LMJV to its property subject to "minimizing environmental effects to natural resources within the project area." (Draft ROD at 2). The project decision fails to minimize environmental effects on multiple fronts.

One stark example of not minimizing environmental effects to natural resources is the decision to strip the scenic easement from two-thirds of the newly configured development parcel, in contradiction to the 1987 land exchange conditions as described above. Another example of increased impacts to visual resources is the conversion of national forest lands with high and moderate Scenic Integrity Objectives to unacceptably low. Neither eliminating the Scenic Easement deed from most of the development parcel nor degrading Scenic Integrity Objectives can be characterized as minimizing environmental effects to natural resources in the project area. Similarly, increased habitat fragmentation and decreased connectivity in a high, cold mountain environment crucial for future landscape resilience in a changing climate increases environmental impacts to natural resources.

The Forest Service argues that obtaining title to the fens and wetlands is an overriding rationale behind the exchange. (Draft ROD at 25) To be completely transparent and honest with the public, the FEIS should document the rationale by which the fens and wetlands were traded out of public ownership in 1987, and how the Forest Service aligned that decision with the same land exchange regulations that its asserts now weight the current exchange in favor of re-acquiring these fens and wetlands. Apparently retaining public ownership was unimportant in 1987 and not considered a substantial environmental benefit at that time, but now the Forest Service claims the fens are "irreplaceable" wetland resources. That begs the question, how pray tell did these fens and wetlands ever originally leave federal ownership? (FEIS at 3-60)

5) Validity of the 1987 Land Exchange

The FEIS asserts that the validity of the 1987 Land Exchange is not under consideration:

"The purpose of the FEIS is to disclose the impacts of the Proposed Action and alternatives, and none of these propose eliminating the 1987 land exchange." (FEIS at 1-14) But then the Forest Service, in contradiction to this statement, now proposes to eliminate the most substantial mitigation pre-condition of the 1987 land exchange, i.e., the imposition of the Scenic Easement deed on the newly created inholding parcel. The Forest Service cannot on the one hand in sweeping fashion dismiss reconsideration of the 1987 land exchange, and then immediately turn around and eliminate the most critical element of that exchange, the Scenic Easement. As described in the FEIS, Alternative 2 eliminates the Scenic Easement from two-thirds of the newly reconfigured development parcel. How can this not be considered eliminating the major protective component, from the public's perspective, of the 1987 land exchange? This approach to cherry-picking elements of the 1987 exchange to eliminate or reconsider while prohibiting other elements from similar reconsideration is an arbitrary and capricious abuse of agency discretion.

6) The Decision Cannot be Based on an Reinterpretation of the 1987 Land Exchange

The FEIS states the 1987 Land Exchange is not under discussion for reconsideration or elimination (FEIS at 1-14). But then the Forest Service attempts to rewrite history by re-characterizing the intent and outcome of the 1987 exchange. It now insists that access for a commercial resort was always intended and the omission of that access was an oversight. That is not supported by the plain facts of the 1987 land exchange and the subsequent recorded deeds and legal documents. As the Forest Service itself notes, "access was not expressly granted at the time of the exchange" (Draft ROD at 21).

Now, the Forest Service is arguing that of course access was always intended in the form of the currently proposed configuration. The Forest Service now asserts that the 1987 land exchange unintentionally left the federal exchange "without the legal access as all parties had initially intended" and furthermore that this was an "inadvertent failure to assure access to the public highway at the time the parcel was created" (FEIS at 1-28). The FEIS provides no documentation or substantiation for these claims.

It is disingenuous for the Forest Service to attempt to reinterpret the exchange almost 30 years after the fact. The legal documents associated with the exchange – the deed, the survey, the scenic easement – all speak for themselves and are contrary to the Forest Service's newly attempted redefinition of 1987 land exchange. In order to adopt the Forest Service's argument that the property survey and deed were in error and an inadvertent failure, one has to believe that both the Forest Service and LMJV were incompetent in 1987. The Forest Service argues in essence that millionaire-billionaire professional real estate investors (LMJV) and their hired professional real-estate land exchange facilitation corporation (Western Land Group) were naïve and unsophisticated purchasers that did not understand what rights and interests to the property they were acquiring in the 1987 transaction. This is patently absurd and contrary to the recorded legal documents from the transaction. The proponents were savvy, sophisticated real estate speculators that undoubtedly knew precisely what property rights and interests they acquired. The only thing that has reasonably changed is their understanding and/or demands of access across the federal lands. This is a closed real estate transaction, as the Forest Service itself argues by insisting the 1987 exchange is not open for discussion or elimination, and the facts of that transaction speak for themselves. If additional access was intended to be conveyed, all of the savvy and sophisticated participants in the transaction would have ensured that it was. The Forest Service must provide documentation to substantiate its claims about the competence and

understanding of the parties to the 1987 land exchange. If parties wish to reopen the 1987 land exchange for reconsideration and reinterpretation, then that courtesy must be extended to all interests including the public.

7) The Decision Ignores the Fact that the 1987 post-ANILCA Land Exchange Was Completed with Full Awareness of the Accompanying Rights of Access

The 1987 land exchange created this inholding out of "whole cloth" of continuously intact federal land ownership. The exchange was initiated, evaluated, and consummated well after enactment of ANILCA in 1980. No inholding and no access existed prior to the 1987 land exchange. One has to presume that both the Forest Service and the sophisticated real estate investor applicants of the 1987 exchange were well aware of any ANILCA access rights that accompanied the creation of the inholding. By definition, the Forest Service and the proponent must have incorporated all relevant information and conveyed access desired and necessary for reasonable use and enjoyment of property under ANILCA at that time. The FEIS needs to discuss why the access rights conveyed with the original land exchange in the full knowledge of the existence and requirements of ANILCA access are now legally insufficient. I understand that the developer proponents want new and improved access different from that they voluntarily and willing acquired in 1987, but the Forest Service has not explained in any fashion why the public is now obligated to enhance the access granted in 1987 after ANILCA. Do the Forest Service, the billionaire real estate investors, and their hired professional land exchange real estate facilitation corporation (Western Land Group) all claim they were oblivious to the existence of ANILCA in 1987? The 1987 access was obviously deemed sufficient for the proponent's reasonable use and enjoyment of their property when LMJV took title to the property, and further action by the public is not required.

8) The Analysis Fully Supports the No Action Alternative as the Alternative that best Minimizes Environmental Impacts to Natural Resources in the Project Area

The FEIS greatly improves on the Draft's analysis of similarly situated inholdings for purposes of granting access necessary for reasonable use and enjoyment of the property. In the FEIS, the Forest Service identified dozens of similarly situated parcels, and determined that over-snow access was reasonable access in many instances. "The Forest's analysis showed that adequate access for contemporaneous use of properties associated with ski areas included both snowplowed and over-the-snow modes." (Draft ROD at 20) This statement provides ample evidence to support selection of the No Action Alternative. The FEIS assessment of values as determined through the approved appraisal is that rural residential lots are the most economically feasible, physically appropriate and maximally productive use of the property. Similarly, the assessment of access in the FEIS finds seasonal access is widely applicable to similarly situated parcels. The NEPA analysis thus neatly aligns the professionally assessed highest and best use of rural residential lots with reasonable and necessary access via seasonal road access. This leads to the logical and defensible conclusion that the No Action Alternative best meets the interests of all parties including the public interest.

Instead, the Forest Service contorts itself in knots over why the conclusions of the appraiser for highest and best use are inappropriate, and thus why alternative access is necessary. This should raise red flags for the public and the federal decision makers. The FEIS has described and analyzed a project valued as rural residential lots with reasonable seasonal access, but the decision shifts to a different project of a commercial resort with necessary highway

access. The inconsistency between the project description and analysis and the rationale behind the final decision is jarring. If as the agency insists, the inholding was always intended as a commercial resort, then it should be appraised as such and the analysis should align consistently with that project description.

9) The Contract Appraiser Apparently Appraised a Project Different than the One Touted by the Forest Service and the Project Proponent.

There is a disconcerting disconnect between the project description used in the appraisal and the project description utilized by the Forest Service to justify its approval of the land exchange. The appraiser, following Forest Service instruction, appraised the project with a highest and best use of five rural residential lots. In contrast, the Forest Service and the project proponent insist the one and only appropriate use ever envisioned for the project is a commercial resort. It strains credibility with the public, and hopefully with higher review officials in the Forest Service, to appraise the project for one use but authorize the exchange for a radically different use.

The appraisal instructions issued to the contract appraiser directed his use of the Sales Comparison Approach, and strongly advised against the use of the Subdivision Development Approach unless he was willing to assume the added costs associated with that approach. (VWC Appraisal Statement of Work, Curtis, Feb. 13, 2012) Thus the Forest Service insisted the Sales Comparison Approach was the only viable method for appraisal. According to Forest Service appraisal requirements, first the property's highest and best use must be determined prior to identifying comparable properties. The four criteria used to determine a parcel's highest and best use are legal permissibility, physical possibility, financial feasibility, and maximum productivity. Sales of similar or comparable properties to the subject are then gathered and analyzed. This approach is most applicable when an active market provides sufficient quantities of qualified sales. (FEIS at 1-16)

The contract appraiser reached the conclusion that the maximally productive and financially feasible use of both the federal and non-federal properties is as five rural residential lots. However, both the Forest Service and the project proponent insist that the only economically feasible and maximally productive use of the property is for a commercial resort. "The intent of the Forest Service in creating the private inholding adjacent to the Wolf Creek Ski Area was to create a village, (Draft ROD at 11) and "I find that the reasonable use and enjoyment of the ±288 acre LMJV parcel (located near the ski area base which is on a snowplowed highway) is the use intended by the Forest Service when the parcel was created – use as a winter resort including commercial and residential properties." (Draft ROD at 21) Given the repeated insistence by the Forest Service that the property was always intended for use as a commercial resort, it is an arbitrary and capricious abuse of agency discretion to prohibit appraisal of the project for this use.

Similarly, the project proponent insists that the use of the property for a handful of rural residential lots is not economically feasible or productive – clearly disputing the contract appraiser's conclusion that is supported by the Forest Service review appraiser. According to LMJV's Clint Jones, "we have no present plans to consider the low density development because it would not be economically feasible to do so." (Jones comment in DEIS record, Oct. 11, 2012).

The appraisal is based on the appraiser's analysis of comparable sales, although he acknowledged "no such data is available that would be truly comparable to the subject property." (Appraiser's Supplemental Report to Self-Contained Appraisal Of Real Property, Village at Wolf

Creek Land Exchange Federal Parcel (Analyzed With Area B) at 18). Despite this caution, the appraiser's conclusion, supported by the Forest Service review appraiser, was based on an analysis of a half-dozen similar or comparable properties identified using his professional discretion.

However, the Forest Service insists there exist no similarly situated properties anywhere within the entire National Forest System: "no similarly situated inholdings have been identified on the Rio Grande NF or elsewhere on NFS lands in the expanded search area." (FEIS at 1-28). Thus on the one hand, the Forest Service claims no similar or comparable inholding properties exist anywhere within the entirety of the National Forest system, but on the other hand has concurred with an appraisal calculated for these very same, non-existent allegedly similar and comparable properties. Again, this is an arbitrary and capricious abuse of discretion for the agency in the same analysis to simultaneously argue both for and against the existence of similar and comparable properties.

The logical conclusion if there are no similar or comparable properties to the LMJV property, as the Forest Service argues, is that the comparable sales approach is invalid. Instead, apparently the Subdivision Development Approach may be the only relevant and defensible appraisal approach, given the Forest Service's assertion of the uniqueness of the subject property and the absence of any similar or comparable properties.

The Draft ROD's conclusion to proceed with the proposed exchange is thus premised on an appraisal of the project's feasible use that is fundamentally at odds with the stated intent and limitations expressed by both the Forest Service and the project proponent. It is arbitrary and capricious to approve the project based on an appraised highest and best use of rural residential lots that the landowner/proponent disputes as economically feasible and which the Forest Service asserts is contrary to its long-standing intent in creating the inholding parcel in 1987. The analysis does not meet NEPA "hard look" requirements when the decision rests on analysis assumptions so clearly at odds with the project description and purpose expressed by both the proponent and the Forest Service.

10) The FEIS Fails to Evaluate a Full Suite of Other Relevant Criteria for Assessing Reasonable Use and Enjoyment

After failing to find any similarly situated inholding parcels in its access analysis and therefore dismissing all of the similarly situated inholding parcels utilized for approval of the appraisal, the Forest Service after the fact inserted one "other relevant criteria" that was never revealed to the public or evaluated under NEPA. "The authorizing officer shall determine what constitutes reasonable use and enjoyment of the lands based on contemporaneous uses made of similarly situated lands in the area and any other relevant criteria." 36 C.F.R. § 251.114(a).

This newly discovered "relevant criteria" is that the presumed original intent of the 1987 exchange was to facilitate creation of a commercial resort. (Draft ROD at 21)

The FEIS contains no discussion or analysis of how this one specific criterion was created that allows for the decision-maker to override and ignore all of the evidence before him/her about similarly situated inholdings. The NEPA analysis provided no opportunity for the public to review or comment on this criterion, and no opportunity to suggest additional criteria.

11) The Decision Ignores and Contradicts Agency Policy Direction on Maintaining and Enhancing Connectivity and Fails to Undertake a Thorough Climate Change Analysis

The FEIS fails to incorporate an analysis of the anticipated consequences of climate

change on the affected environment, and most specifically, the Wolf Creek Pass Lynx Linkage (WCPLL). The only climate change impact analysis included in the FEIS is a discussion of the carbon-dioxide emissions associated with the project, but does not deal with the pressing need as expressed by the Chief for maintaining landscape connectivity and resilience to climate change in agency actions. This absence is surprising given the extensive emphasis accorded to climate change impacts and adaptation as detailed in Forest Service policy pronouncements. Chief Tidwell's stated goal for the agency is to "Ensure our national forests and private working lands are conserved, restored, and made more resilient to climate change, while enhancing our water resources." (http://www.fs.fed.us/climatechange) The FEIS omits any discussion about how the proposed land exchange advances the Chief's direction on conserving, restoring and making Wolf Creek Pass more resilient to climate change. This violates the mandate that "Actions carried out on NFS lands **must comply with Forest Service policy** as well as specific management direction contained in the Rio Grande NF's 1996 Revised Land and Resource Management Plan (1996 Forest Plan)." (emphasis added) (FEIS at 1-15)

The FEIS ignores all mention and consideration of the Forest Service's National Roadmap for Responding to Climate Change (USDA Forest Service, 2011). Instead, in response to comments, the Forest Service dismisses the roadmap as just a one-page scorecard intended to rate how well units are doing in terms of recycling, energy efficiency, and fleet emission reductions. (FEIS Vol 2 at 114) One has to imagine Chief Tidwell would be astonished and perhaps appalled to learn how little attention the Rio Grande NF and Region 2 have accorded his policy instruction on climate change.

As a consequence of disregarding the Chief's policy direction about evaluating climate change adaptation and landscape resilience, the FEIS utterly fails to incorporate a requisite "hard look" at the impacts of the proposed exchange and its foreseeable indirect environmental impacts on landscape resilience and connectivity of the Wolf Creek Pass linkage corridor.

The FEIS acknowledges that climate change projections predict that habitat is shifting up mountain slopes (FEIS at 3-76). The Forest Service's climate change roadmap has explicit recommendations for management actions necessary to preserve the existence of species on the national forests. However, the Forest Service's proposed decision directly conflicts with this policy direction. Per the agency's National Roadmap for Responding to Climate Change, "To protect all these species and more, the Forest Service will need to make habitats more resilient to climate change and increase connectivity among them." (National Roadmap at 24)

> "Climate Change Impacts: Animals Adapted to Cold
> Many animal species occupy a geographic range within certain thermal limits. **Because the Forest Service manages many cold, higher elevation landscapes, it plays an important role in sustaining populations of cold-adapted species.** As annual temperatures rise, animals will shift northward or move to higher elevations. For example, many species in the Great Basin, in particular butterflies and pika, will be forced into smaller, more isolated patches of high-elevation habitats. Similarly, many trout and char populations will be forced into smaller, more isolated headwaters; some might disappear. Woodland caribou in northern Idaho occupy the southern extent of their range. Northward migration would eliminate them from the Continental United States. **To protect all these species and more, the Forest Service will need to make habitats more resilient to climate change and increase connectivity among them**. Failure will

mean the disappearance of these species from the National Forest System." (National Roadmap at 24) (emphasis added)

The Chief has charged national forests, including the Rio Grande National Forest, with explicit responsibilities in analysis and planning of activities such as that described in the FEIS:

"**Addressing climate change in planning and analysis by doing the following:**
– Incorporating climate-related vulnerabilities and uncertainties into land management and project-level environmental analyses.
– Discussing how a range of uncertain future climate conditions might affect the expected consequences of proposed activities." (National Roadmap at25)

The FEIS fails to meet this charge because of the absence of any analysis or discussion about the impact of future climate conditions on the viability of the WCPLL caused by the proposed activity of the Village at Wolf Creek. The FEIS does not contain a hard look at how the range of future climate conditions may affect the consequences of a shrinking, fragmented landscape corridor at Wolf Creek Pass and does not incorporate a climate-related vulnerabilities analysis of the various land exchange alternatives.

Forest Service policy further requires focus and attention to improved connectivity. The Forest Service's proposed action explicitly destroys connectivity. As directed by the Chief in the National Roadmap:

"Connect habitats to improve adaptive capacity**.**
– Collaborate with partners to develop strategies that identify priority locations for maintaining and restoring habitat connectivity. Seek partnerships with private landowners to provide migration corridors across private lands.
– Remove or modify physical impediments to the movement of species most likely to be affected by climate change.
– Manage forest and grassland ecosystems to decrease fragmentation.
– Continue to develop and restore important corridors for fish and wildlife." (National Roadmap at 26)

The Forest Service cannot comply with agency direction to maintain and restore habitat connectivity and to remove physical impediments to the movement of species, such as lynx, likely to be affected by climate change by authorizing a discretionary activity such as a land exchange that will diminish connectivity, increase fragmentation and create additional physical impediments to movement at WCPLL.

The lack of any analysis in the FEIS, much less the "hard look" required by NEPA, of the consequence of climate change to the future significance of the Wolf Creek Pass Lynx Linkage shortchanges the public's interest. Protecting key areas of connectivity is one of the most pressing management concerns in an era of rapidly changing climate. The Forest Service must assess the proposed land exchange against the Forest Service's legal and policy mandates for managing for resilient habitat in the face of climate change.

Critical factors for protecting habitat resilience are to reduce stresses on the ecosystem, and to protect and enhance habitat connectivity. The FEIS's preferred alternative for a land exchange, whose stated purpose is to facilitate the construction of a multi-season resort housing

thousands of visitors and residents, is diametrically in opposition to the Forest Service's inherent duties for protecting public resources, particularly in the context of climate change. Thousands of year-round residents and visitors housed atop Wolf Creek Pass, in the heart of the most significant landscape connection in the Southern Rocky Mountains, creates an intolerable, immense and entirely avoidable human stress on the ecosystem. The Forest Service cannot proceed with this exchange and conform to its agency climate change policy goals.

The Forest Service asserts that the increased fragmentation and decreased connectivity will be mitigated for lynx through speculative lynx conservation measures attached to the decision in recognition of the significance of the WCPLL for lynx dispersal and the fact that the WCPLL has been the principal linkage for lynx in southern San Juan Mountains. The Forest Service argues that establishing a new, year-round high-altitude commercial and residential development in the midst of the Wolf Creek Pass landscape corridor will not permanently and irretrievably destroy the value of this corridor for habitat connectivity if given conservation measures are included in the decision. The FEIS notes that: "Year-round traffic levels on Hwy 160 through the WCPLL resulting from background traffic (including WCSA) and that may be generated from the Village at full build-out under the Moderate and Maximum Density Development Concepts would be far above the range documented to impair lynx movements." (FEIS at 4-117) Also, "Nevertheless, impaired movements and landscape level habitat connectivity would increase habitat fragmentation that could adversely affect the dynamics and effectiveness of the habitat block south of Hwy 160." (FEIS at 4-118) The Forest Service suggests "conservation measures needed to minimize inconsistency" (FEIS at 4-120). The Forest Service asserts that the land exchange proponent (LMJV) commits to implement conservation measures that meet the intent of the clause in the Southern Rockies Lynx Management Direction Standards to "maintain habitat connectivity" (FEIS at 4-115). But these conservation measures are only intended "to provide enough lynx habitat to conserve lynx" and do not mean even keeping the status quo intact for lynx. (FEIS at 4-115).

The USFWS Biological Opinion for the project is full of damning evidence about the impact of the Forest Service's proposed decision. "Permeability within the Landscape Linkage will be reduced due to location of Village within the landscape creating an additional impediment to lynx movement." (USFWS BO at 19) The increased fragmentation of the landscape caused by the Village at Wolf Creek extends at least 1.6 miles. (USFWS BO at 25) "We find that the Village's contribution to traffic will significantly increase the level of fragmentation of the U.S. 160 corridor, and reduce home range effectiveness and habitat connectivity with lynx habitat adjacent to the corridor." (USFWS BO at 31)

The sum total of impacts to lynx of the proposed action that approves the exchange and resultant development will be "highway mortality, impaired landscape connectivity, habitat loss (on the resulting private parcel and adjacent to the highway), and other possible contributions (e.g., increased risk of poaching) in the SJCA [San Juan Core Area] and WCPLL." (FEIS Vol 2 at 133). The described lynx conservation measures are intended to reduce anticipated take and to reduce adverse impacts, but not to entirely eliminate those and apparently will lead to a reduction in the status quo. Degrading the status quo for lynx and creating new obstacles and impaired connectivity in no way can be construed as advancing the Chief's climate change policy as outlined in his Roadmap to make cold, higher elevation landscapes such as Wolf Creek Pass "more resilient to climate change and increase connectivity among them." The FEIS fails NEPA's required "hard look" by its complete omission of any discussion or consideration of consistency of the proposed action with agency policy as expressed by the Forest Service's

National Roadmap for Responding to Climate Change.

The Forest Service is asking the public to accept the proposed action on the basis that lynx conservation measures will be implemented that hopefully will prevent the entire defeat of the Wolf Creek Pass corridor for future connectivity. In 1987, the Forest Service similarly asked the public to accept that exchange on the premise that a scenic easement deed would protect scenic resources on the Rio Grande NF, a condition that will now be abandoned across two-thirds of the development parcel. Why should the public believe the Forest Service will adhere to the current crop of mitigations and conditions when previous conditions are now being arbitrarily cast aside?

12) The Decision is Based in part on Speculative and Unsubstantiated Claims

One of the reasons stated by the Forest Service for approving the exchange is that "WCSA appears to support the proposed exchange." (Draft ROD at 25). The Forest Service cannot base decisions on speculative opinions assigned to third parties about the proposed land exchange. Either Wolf Creek Ski Area supports the land exchange or does not support it. That is a factual position that must be substantiated by evidence supplied by the ski area in comments. It is not the Forest Service's job to speculate about the positions or motivations of the ski area, and this approach of basing its public interest determination on speculative musings invalidates the decision. Wolf Creek Ski Area's comment letter that is included in the record does not state a preference for or against the land exchange. (WCSA comment letter, CL 847 in record) Rather, it references appreciation for analysis of a reasonably realistic range of options. The ROD must substantiate the rationale that WCSA supports the proposed exchange or delete this statement from the listed reasons alleging the exchange is in the public interest.

13) The Decision is Counter to the Evidence Before the Agency

Courts have routinely rejected agency decisions when the selected action is clearly contrary to the expressed science. One recent reiteration of this precept was Judge Sullivan's decision to reject a winter use management plan put forth by Yellowstone National Park as clearly contrary to the underlying science on which the agency relied. (Greater Yellowstone Coalition v. Kempthorne, 577 F. Supp. 2d 183, 193 (D.D.C. 2008))

Under the Administrative Procedure Act, federal agency actions are to be held unlawful and set aside where they are ''arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'' *See* 5 U.S.C. § 706(2)(A). While this standard does not empower courts to substitute their judgment for that of the agency, it requires ''a thorough, probing, in-depth review'' of challenged decisions. *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 415– 16, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971).

Accordingly, an administrative action must be vacated where the agency relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983); *see also Daingerfield Island Protective Soc'y v. Babbitt,* 40 F.3d 442, 446 (D.C.Cir.1995)

The Forest Service has entirely failed to consider important aspects of the proposed land exchange. The Forest Service risks violating the APA by adopting an arbitrary and capricious decision to authorize a discretionary land exchange that ignores key aspects of the issue, such as

climate change impacts and agency policy directives for assessing climate change impacts. The preferred alternative runs counter to the evidence before the Forest Service relative to habitat connectivity, fragmentation, and the future increased importance of the WCPLL in a changing climate.

The Forest Service has offered an explanation for its decision that runs counter to the evidence before the agency such as appraising the property for one use (rural residential) but insisting on access for a different use (commercial resort), and inexplicably abandoning the Scenic Easement requirement once deemed crucial to the rationale behind the inholding's original creation.

Conclusion

In summary, the Forest Service's preferred alternative of a land exchange with the Village at Wolf Creek is not in the public's interest, is destructive of public resources, and does not comply with the Forest Service's legal and policy mandates. It should be rejected in favor of the No Action Alternative.

Sincerely yours,

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